No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

CANADIAN RIVER GAS COMPANY, a Corporation, and
COLORADO INTERSTATE GAS COMPANY, a Corporation,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit will be found at page 39 of the Record and is reported in 110 Fed. (2d) 350. It was dated March 4, 1940. Rehearing was denied July 24, 1940. (R. p. 64) The opinion on Petition for Rehearing will be found at page 60 of the Record. It is not yet reported.

II.

JURISDICTION

The jurisdiction of this court is invoked under Section 19 (b) of the Natural Gas Act (52 Stat. 831, U.S.C.A. Title 15, Section 717 (r)).

III.

STATEMENT OF THE CASE

This appears beginning on page 2 of the Petition for Certiorari.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

It is respectfully submitted that the Circuit Court of Appeals erred:

1. In assuming, as it apparently did, although not discussed in either of the opinions, that it had jurisdiction to entertain the Motion to Dismiss filed by the Commission notwithstanding the failure of the Commission to file with the court the transcript of record as required by Section 19 (b) of the Natural Gas Act.

2. In holding that the order of March 14, 1939, was not a reviewable order.

V.

ARGUMENT

1. The Circuit Court of Appeals had no jurisdiction to entertain the Motion to Dismiss in view of the failure of the Commission to certify and file the transcript of record.

Following the denial by the Commission of our Petition for Rehearing with respect to the order of March 14, 1939, and on July 7, 1939, the Petition for Review was filed. Shortly thereafter the Power Commission filed its Motion to Dismiss but never at any time certified or filed with the court

a transcript of the record upon which the order complained of was entered. Section 19 (b) of the Natural Gas Act provides:

> "A copy of such petition shall forthwith be served upon any member of the Commission *and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part.*" (Emphasis ours.)

The provision of the National Labor Relations Act with respect to this subject is the same as that just quoted above from the Natural Gas Act, and *In The Matter of the Petition of the National Labor Relations Board for a Writ of Prohibition and for a Writ of Mandamus*, 304 U. S. 486, this court considered the jurisdiction of the court to take action in the absence of the certification and filing of the transcript of record with the court and held:

> "Here it is quite plain that the court is without jurisdiction to take action at the behest of the Board until transcript shall have been filed and notice of the petition and transcript have been served."

2. The order of March 14, 1939, is a reviewable order.

As shown in the statement of the case in the Petition, the order of March 14, 1939, was the culmination of an administrative process before the Commission initiated by its General Orders 51 and 53 under date of July 5, 1938. These orders and the questionnaires attached, which were fully complied with and answered by Petitioners, gave to the Commission all of the information by it deemed appropriate for the purpose of determining the status of Petitioners and the jurisdiction of the Commission over Petitioners and its right to abrogate Petitioners' contract prices, if found to be unreasonable or discriminatory, and to substitute therefor regulated rates.

This is manifest from Subdivision (e) of the Order of March 14 which finds and decides that Petitioners

> "are engaged in transportation of natural gas in interstate commerce and sale in interstate commerce of natural gas for resale for ultimate public consumption, domestic, commercial, industrial, and other uses, and are, therefore, natural gas companies within the meaning of the Natural Gas Act," (R. p. 21).

and also by the final provision of said Order wherein investigation was instituted concerning the rates and contracts of Petitioners, which, of course, would be a futile thing if, as a matter of fact and of law, Petitioners were not subject to the jurisdiction of the Commission, or if its contracts for the sale of gas for ultimate public consumption, made some ten years prior to the passage of the Natural Gas Act, were not subject to abrogation.

That the Commission had received and considered all evidence bearing upon status and jurisdiction and the right of the Commission to abrogate Petitioners' contracts, which it deemed pertinent, is demonstrated by the overruling of the Petition for Rehearing in which Petitioners set forth fully the facts and circumstances with respect to their status and their contracts. This is further conclusively demonstrated by its opinion No. 37 *In Re East Ohio Gas Co.*, 28 P.U. R. (N.S.) 129, which the Commission adopted as its opinion in the overruling of the Petition for Rehearing filed by Petitioners herein. In Re East Ohio Gas Case the identical investigation had been made pursuant to General Orders 51 and 53 and a similar application for rehearing had been made. In that opinion the Commission said:

> "The company further asserts that the findings made and the facts assumed by the order are not based upon any evidence disclosed to the company or appearing in the record herein. The Commission, on July 5, 1938, by its Order No. 51, entered pursuant to the authority vested in it by Sections 10 and 14 of the Natural Gas Act, *instituted an investigation* of natural gas companies and directed the filing of reports by such com-

panies. On August 15, 1938, The East Ohio Gas Company filed a response to the questionnaire authorized by said Order No. 51, and supplied the information called for thereby, including a map showing the location of its facilities, and a description of the use and method of operation of its facilities. *From the information thus supplied* by The East Ohio Gas Company, the Commission acquired considerable familiarity with the operations of the company. The Commission did not assume any facts which were not already known to The East Ohio Gas Company and supplied to the Commission by that company." (Emphasis ours.)

The Commission further said respecting the legal questions raised by the Gas Company:

> "The circumstance that the company transports gas 'for its own account' which is 'owned by it and purchased by it from a single vendor under private contract' does not exempt the company from the Natural Gas Act, as the act is not restricted in its application to companies engaged in the transportation of natural gas in interstate commerce as 'common carriers,' but applies to all 'engaged in the transportation of natural gas in interstate commerce.' "

The Commission further said:

> "The company claims that it is not transporting natural gas in interstate commerce as a public utility 'and cannot constitutionally be declared such by the legislative fiat of Section 1 (a) of the Natural Gas Act.' It is not within the Commission's province to pass upon the constitutionality of statutes enacted by Congress."

It is our contention that the case at bar falls directly and squarely within the doctrine of *Rochester Tel. Corp. v. United States*, 307 U. S. 125. In that case the Rochester, claiming that it came within an exemption and therefore not subject to the Communications Act, refused to comply with certain general orders of the Commission. Whereupon the Commission ordered a hearing at which the Rochester should show cause why it should not comply with such orders. Following the hearing before an examiner, the Com-

munications Commission adopted his tentative report to the effect that the Rochester was not within the exemption and accordingly was subject to the Act and made its order classifying the Rochester as a carrier subject to the Act. This court held such order to be reviewable because it determined the rights, obligations and status of the company under the Act.

In our case, the Commission, having obtained all of the information which it deemed material or relevant on the issue under consideration, made its findings as to our status, rights and obligations under the Act. In the Rochester Case, the Commission did nothing more for the time being, whereas in our case, by the same order, it initiated a proceeding for the purpose of determining the reasonableness of Petitioners' rates and the abrogating of their contracts if found unreasonable or discriminatory. But this additional matter covered by the order in our case, we submit, did not limit or detract from the conclusiveness of the determination of status already made in said order, and does not justify any distinction between the two cases. The determination of status in the Rochester Case, as said by Mr. Justice Frankfurter, subjected the Rochester immediately to previously formulated general orders of the Commission. Although he did not say so, such determination also, of course, immediately subjected the Rochester to the mandatory and prohibitory provisions of the Act, and although he did not say so, such determination, of course, also immediately subjected the Rochester to all subsequent general and special orders which the Commission might make in the performance of its duties under the Act. In the original opinion of the Circuit Court of Appeals in our case, the court limited the application of the Rochester Case to cases where there were outstanding and uncomplied with previously formulated general orders. We submit that that is a very narrow construction of the language used and the holding made in the Rochester Case. In the Rochester Case, Mr. Justice Frankfurter said:

> "From these general considerations, the court evolved two specific doctrines limiting judicial review

> of orders of the Interstate Commerce Commission. *One is the primary jurisdiction doctrine,* firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426. Thereby matters which called for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. *The other is the doctrine of administrative finality.*" (Emphasis ours.)

Thereupon the court applied these two tests to the Rochester Case and then used this language, which we submit is directly applicable to our situation:

> "The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration regarding the status of the Rochester under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, *in conjunction with other orders,* made determination of the status of the Rochester a reviewable order of the Commission." (Emphasis ours).

The same doctrine was enunciated in *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156; that is, that the test of reviewability is primary recourse and administrative finality.

In our case, there was no attempt on the part of Petitioners to seek relief in court until the administrative process involving status and the abrogation of contracts had run its course and was definitely and finally concluded by the overruling of the Petition for Rehearing. Thus, there was full compliance with the first test, namely, that of the primary jurisdiction doctrine, and there was also administrative finality with respect to this question of status.

We call particular attention to Note 11 appended to the decision in the Rochester Case, where Mr. Justice Frankfurter deals with and overrules the cases of *Lehigh Valley v. United States,* 243 U. S. 412, and *Piedmont & Northern Ry. v. United States,* 280 U. S. 469. These cases are discussed in the opinion on rehearing in the case at bar as if we had cited them in support of our position, whereas we referred in our argument to the disposition made of these two cases by this court in Note 11, wherein the court clearly indicates that in these two cases the orders should have been held to be reviewable, whereas they were decided otherwise. In that Note, referring to the Lehigh Valley Case, it was said:

> "Therefore, the Commission's order that the Lehigh Valley was subject to the Panama Canal Act was responsible for the risk as much as if it had expressly commanded the Lehigh to stop running its boat lines, and assuming the Lehigh was within the prohibition of the statute, the Commission's order denying an exemption had the same practical effect as a direct command."

Discussing the Piedmont Case in the Note, it is said:

> "The bill to enjoin the Commission from taking any proceeding against the Piedmont & Northern under this order attacked the action of the Commission solely on its assumption of jurisdiction. The court held that the order was not reviewable on the ground that the order did not adjudicate the railroad's status, did not command it to do anything but only had the effect of increasing the Piedmont's doubts as to the correctness of its construction of the statute. To be sure, statutory construction is a judicial function, *but this is to view the matter too abstractly,* for the Commission itself had instituted the system whereby it requested preliminary submission to it of the status of 'interurban roads'. Such a decision was at least the equivalent of a *threat of prosecution under the statute,* and, in fact, considerable weight is given to administrative practice in ascertaining the meaning of such legislation." (Emphasis Ours.)

In our Petition for Rehearing, we brought to the attention of the court the fact that there were many mandatory and prohibitory provisions in the Natural Gas Act itself to which Petitioners immediately became subject when the Commission in the Order of March 14, 1939, made its findings with respect to the status of Petitioners and particularly after the Commission had overruled their Petition for Rehearing. We also brought to the attention of the court three important general orders made subsequent to the Order of March 14, 1939, and which Petitioners had not complied with and did not intend to comply with until their status was finally determined. These Orders will be found beginning at page 53 of the Record. The Circuit Court of Appeals, however, disregarded our contention to the effect that inasmuch as Petitioners, upon the entry of the Order of March 14, 1939, became immediately subject to the mandatory and prohibitory provisions of the Natural Gas Act, our case came squarely within the doctrine of the Rochester Case. With respect to the general orders subsequently entered, the court held that the question of whether the Order of March 14, 1939, is reviewable must be determined under the facts existing at the time the Petition for Review was filed. We submit that the mandatory and prohibitory provisions of the Act itself furnish just as good reason for holding the order reviewable as did the previously formulated mandatory general orders of the Commission referred to in the Rochester Case, and that the application to Petitioners of the three general orders subsequently issued followed as a necessary consequence of the Order of March 14, 1939. Such orders had to be issued and applied to such companies as the Commission found to be subject to its jurisdiction, in order to carry out the purposes of the Act.

In view of the necessary consequences to Petitioners under the broad regulatory provisions of the Natural Gas Act, and the important question of status and the right of the Commission to abrogate contracts made long prior to any action by the Congress in this field, surely good policy and fair dealing suggest a judicial determination of these questions in advance of the incurring by both the Government and Petitioners of enormous expense in going through

the regulatory process concerning rates, and that, we submit, is the philosophy and the background of the decision of this court in the Rochester Case.

We submit also that a different conclusion cannot be reached, because technically it may be said that this is an "interim order" or an "interlocutory order" or "a step in procedure." These were convenient terms frequently used in cases decided prior to the Rochester Case, just as the term "negative order" found its place in a philosophy wholly at variance with that found in the Rochester Case. The point is, that on this important issue of status and contracts we have a final order, with the serious and important consequences to Petitioners if they are right in the position which they take as to their status and contracts and the jurisdiction of the Commission; and we repeat, we have the primary resort and the administrative finality which Mr. Justice Frankfurter in the Rochester Case correctly held to be the test of reviewability.

We cite the case of *Valvoline Oil Co. v. U. S.*, 308 U. S. 141, 84 L. Ed. 112, which was decided after the Rochester Case, in which the unanimous opinion of the court was rendered by Mr. Justice Reed. In that case the Interstate Commerce Commission was engaged in the valuation of the Valvoline Company (an oil pipeline company), and in aid of such proceeding issued an order requiring the Valvoline Company to submit certain maps, charts, schedules and other data. The company brought suit under the Urgent Deficiencies Act to enjoin the enforcement of the order, claiming it was not a common carrier of oil, and was not subject to the Interstate Commerce Act. The court entertained the case, as did this court, without either court or commission or the United States even raising the question that there was involved only an "interim order" or an "interlocutory order," or that the order in question was "a mere step in procedure." This, we submit, is an additional confirmation of our contention with respect to the breadth and scope of the Rochester Case.

We submit also that such cases as *U. S. v. Los Angeles*, 273 U. S. 299, and *U. S. v. Illinois Central R. Co.*, 244 U. S.

82, cited in the original opinion of the Circuit Court of Appeals as being apposite, have no application whatsoever to the situation involved in the case at bar, particularly after the decision in the Rochester Case. Neither involved an order determining status.

It is perhaps unnecessary to remind the court that we have not yet been allowed to present fully our argument on the question of status and contracts, as the case has been heard only on the question of reviewability.

For these reasons we respectfully submit that Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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